(2)

No. 08-1205

In the Supreme Court of the United States

A. STEPHAN BOTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court, in denying petitioner's motion for a mistrial after the lead prosecutor at his trial was chosen to become a United States magistrate judge, correctly declined to apply an "appearance of impropriety" standard for the disqualification of the prosecutor.

2. Whether the court of appeals erred in affirming petitioner's sentence as procedurally reasonable, when petitioner did not object at sentencing that the district court was treating the Sentencing Guidelines as mandatory or presumptively reasonable, and the district court did not in fact do so.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted in 290 Fed. Appx. 316.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2008. A petition for rehearing was denied on October 27, 2008 (Pet. App. 4-5). On January 15, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 26, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of one count of conspiracy to embezzle federal funds and defraud the State of Georgia of money and honest services, in violation of 18 U.S.C. 371; 11 counts of embezzlement of federal funds, in violation of 18 U.S.C. 666; and three counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 1-2. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2. The district court entered an order of restitution and a criminal forfeiture judgment against petitioner in the amount of $382,394. *Ibid.* The court of appeals affirmed.

1. Petitioner participated in a series of transactions relating to the ultimately unsuccessful campaign of Linda Schrenko for the 2002 Republican gubernatorial nomination in Georgia. Schrenko was Georgia's State School Superintendent at the time of the primary campaign, and she had the authority to enter into contracts for goods and services for up to $50,000 on behalf of the Georgia Department of Education (GDOE) without seeking prior approval. The GDOE received about $650 million in funding from the United States Department of Education in 2002. Gov't C.A. Br. 6.

Petitioner, Schrenko, Schrenko's deputy (Merle Temple), and others orchestrated a scheme in which companies controlled by petitioner obtained more than $500,000 in GDOE funds using purported contracts in which little or nothing of value was provided to GDOE, and then secretly funneled a substantial portion of those funds back into Schrenko's gubernatorial primary campaign. Gov't C.A. Br. 6-20. Petitioner, Schrenko, Temple, and a fourth defendant (who was ultimately acquit-

ted) were variously indicted for conspiracy, embezzlement, wire fraud, money laundering, and structuring transactions.

2. a. Temple entered a plea agreement before trial. Doc. 62. The morning of May 1, 2006, petitioner, Schrenko and the fourth defendant began trial in the Northern District of Georgia. Later that day, the district judge presiding over petitioner's trial participated in the selection of a new United States magistrate judge for the Northern District of Georgia. See 28 U.S.C. 631(a). The judges of the district selected then-Assistant United States Attorney (AUSA) Russell Vineyard. AUSA Vineyard was the lead prosecutor at petitioner's trial, and it was anticipated that he would be sworn in as a magistrate judge in late October 2006, several months after the trial would conclude. 5/2/06 Tr. 166-167, 191.

On May 2, 2006, petitioner's counsel moved for a mistrial if AUSA Vineyard did not withdraw as government counsel. 5/2/06 Tr. 167. Petitioner had advised his counsel that he was concerned his attorneys would not zealously challenge AUSA Vineyard during trial. *Id.* at 169. Petitioner's counsel claimed that although there was no "actual impropriety," there was a serious issue of an appearance of impropriety, particularly if jurors were to learn that the district judge had supported AUSA Vineyard's selection. *Id.* at 170, 194. In response, AUSA Vineyard noted initially that petitioner's counsel had known of his pending application for some time and had raised no concerns. *Id.* at 172. The government further pointed out that—despite the common occurrence of federal prosecutors being candidates for, and being selected for, positions as magistrate judges—no party in petitioner's case had located a decision holding that a

prosecutor should be disqualified in such circumstances. *Id.* at 174-180, 183, 191. The government also contended that "appearance of impropriety" was not the standard for disqualification of trial counsel, and that the appearance of impropriety argument advanced by petitioner was "just the remotest speculation in this case." *Id.* at 188. Finally, the government argued that if AUSA Vineyard had any conflict of interest, it would stem from his "trying to appear neutral rather than [] vigorously representing the United States," but the government had no concern on that score and would waive any conflict. *Id.* at 189-191.

Petitioner's counsel repeatedly made it clear that petitioner was not seeking recusal of the district judge. 5/2/06 Tr. 187-188 ("THE COURT: * * * Your motion was not to recuse myself? MR. STEEL: No, sir."); *id.* at 196 ("[W]e're not asking to remove this honorable Court. We don't want to lose this Court."). Rather, petitioner suggested the court adopt a "bright line rule" that when attorneys "make[] it known that they will be with the Court * * *, they should not be prosecuting a case in the same courthouse where they will be working as the Court." *Id.* at 195.

After considering the arguments of counsel, the district judge declined to disqualify AUSA Vineyard or declare a mistrial. The district judge stated:

> [C]ounsel for the Defendants have perceived that my impartiality—that neither my impartiality nor Mr. Vineyard's impartiality is at issue in this case. They're more concerned about the public perception.
>
> Having taken all that into consideration, the Court is going to allow Mr. Vineyard to remain in the case until such time as he's sworn in as a U.S. Magis-

> trate. Therefore, I'm going to deny the Motion for Mistrial.

5/2/06 Tr. 199-200.

b. The trial resumed. Several days later Schrenko and the government reached a plea agreement. Gov't C.A. Br. 5 n.2. The jury found petitioner guilty on 15 counts, and acquitted him of the remaining counts.

c. Schrenko was sentenced first. Pursuant to her plea agreement, the district court imposed a sentence of 96 months of imprisonment, to be followed by three years of supervised release. Doc. 268. She did not appeal.

At petitioner's sentencing two months later, the district judge calculated petitioner's total offense level at 30 (with a base offense level of ten under Sentencing Guidelines § 2C1.7(a); an increase of 14 levels, pursuant to Sentencing Guidelines § 2B1.1(b)(1)(H), because of a loss amount of $614,387.50; an increase of four levels, pursuant to Sentencing Guidelines § 3B1.1(a), because of petitioner's leadership role in the offense; and an increase of two levels, pursuant to Sentencing Guidelines § 3C1.1, because of petitioner's obstruction of the investigation). Gov't C.A. Br. 26-28; 9/11/06 Tr. 3, 21-23, 27. With petitioner's category I criminal history, his advisory Sentencing Guidelines range was 97 to 121 months. *Id.* at 29.

Before the imposition of sentence, petitioner's counsel enumerated various considerations under 18 U.S.C. 3553(a) to support his argument for a "more lenient sentence than the guideline range calls for." 9/11/06 Tr. 62-66. The government countered that, given that petitioner remained "defiant and unrepentant" at sentencing and "characterize[d] himself as a victim," "a sentence within the guideline range would be appropriate

under the 3553(a) factors to promote respect for the law and to reflect the seriousness of the offense." *Id.* at 67. The judge then announced he would sentence petitioner within the guidelines range and imposed a sentence of 97 months of imprisonment, stating:

> Let the record reflect the Court had considered sentencing the defendant pursuant to 18 U.S.C. 3553 and the factors outlined therein. However, the Court decided not to since a more appropriate sentence can be imposed pursuant to the custody guideline range as outlined in the U.S. Sentencing Commission [Guidelines]. Also, the Court has sentenced the other defendants pursuant to the guideline range. And the Court hereby imposes [a sentence of 97 months of imprisonment].

Id. at 67-68. Petitioner raised no objection.[1]

Temple was sentenced the same day as petitioner, and like petitioner, he was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. Doc. 284. He did not appeal.

3. Petitioner appealed. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-3. The court of appeals stated that it had carefully reviewed the record and the briefs of the parties, and it listed petitioner's 15 arguments challenging his convictions and his sentence, including his claim that the district judge erred in denying a mistrial based on the selection of a prosecutor as magistrate and his claim that his sentence was unreasonable. *Id.* at 2-3. The court of

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[1] After the court pronounced sentence, petitioner's counsel renewed "[j]ust the objections previously made," 9/11/06 Tr. 71, but there had been no "objection[] previously made" to the district court's treatment of Section 3553.

appeals stated without further explanation that petitioner's arguments had "no merit," and it affirmed the judgment of the district court. *Id.* at 3.

ARGUMENT

1. Petitioner seeks review on the question whether a motion for a mistrial, based on the prosecutor's selection as a magistrate judge, is evaluated under an "appearance of impropriety" standard. Pet. i, 7-12. Petitioner identifies no other decisions addressing this issue, let alone a disagreement among the courts of appeals or a conflict with any decision of this Court. In any event, the decision of the court of appeals is correct. Further review of this claim is therefore unwarranted.

a. As both the petition and the extensive oral colloquy with the district court reflect (*e.g.*, 5/2/06 Tr. 187, 190, 191, 196), petitioner has uncovered no judicial decisions on the standard for recusing an attorney who is selected to be a magistrate judge (or for declaring a mistrial on that basis). The decision of the court of appeals rejecting petitioner's mistrial argument thus does not conflict with any decision of this Court or any other court of appeals. Moreover, the court of appeals' affirmance without opinion renders the basis for the judgment unclear. Rather than adopting the legal rule petitioner attributes to it, the court may instead have concluded there was in fact no meaningful "appearance of impropriety" (as the government had argued, *id.* at 188).[2]

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[2] To the extent that petitioner suggests (Pet. 9) that the government conceded that AUSA Vineyard's participation created an appearance of impropriety, he is mistaken. See Sup. Ct. R. 15.2. Although the government did not agree that "appearance of impropriety" was the standard for disqualification of counsel under the Georgia rules, the govern-

In any event, an "appearance of impropriety" standard has no application here. Under the American Bar Association's Model Rules of Professional Conduct—on which the Georgia Rules of Professional Conduct (Georgia Rules) are modeled—"the appearance of impropriety is not a ground for disqualifying a lawyer from representing a party to a lawsuit." *Waters* v. *Kemp*, 845 F.2d 260, 265 & n.12 (11th Cir. 1988); accord *State* v. *Shearson Lehman Bros.*, 372 S.E.2d 276, 279 (Ga. Ct. App. 1988) (applying Georgia Code of Professional Responsibility, which preceded the Georgia Rules) ("The case law is clear that counsel may not be disqualified on the basis of an appearance of impropriety alone.") (citing *Blumenfeld* v. *Borenstein*, 276 S.E.2d 607, 608 (Ga. 1981)). Petitioner cites no contrary authority. The Georgia Rules provide for disqualification of an attorney only where there is a conflict of interest that has not been properly waived (see Ga. R. Prof'l Conduct 1.7), but petitioner has identified no such conflict in this case—and if any conflict did exist, it would be the United States' conflict to waive, which the United States Attorney did, see 5/2/06 Tr. 191.

Petitioner nonetheless points (Pet. 10) to Georgia Rule 8.2(b), which provides that "[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct." Petitioner argues (*ibid.*) that AUSA Vineyard, as a "candidate for judicial office," was subject to Canon 2 of the Georgia Code of Judicial Conduct (Code), "Judges Shall Avoid Impropriety and the Appearance of Impropriety in All Their Activities." As an initial matter, petitioner

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ment also stressed that petitioner's claims on that score were based on the "remotest speculation." 5/2/06 Tr. 188.

did not argue in the district court that the Code was applicable to AUSA Vineyard; review of that unpreserved claim accordingly would be for plain error only. Also, petitioner frames this as a matter of state ethics rules, an issue on which this Court ordinarily would not opine. See, *e.g.*, *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996) (per curiam) (Court does not normally grant a writ of certiorari to decide questions of state law).

Moreover, petitioner's argument is incorrect on the merits, for three reasons. *First*, Georgia Rule 8.2(b) by its terms subjects an attorney only to "applicable provisions" of the Code. Comment 2 to Georgia Rule 8.2 implies that the "applicable limitations" are only those "on political activity." *Second*, even if there are other "applicable provisions," avoidance of the appearance of impropriety is not one of them. The appearance of impropriety is measured by the "perception that the judge's ability to carry out *judicial* responsibilities with integrity, impartiality and competence is impaired," but a candidate for judicial office by definition has no such responsibilities. Code Canon 2A cmt. (emphasis added). *Third*, even if that test extended to *all* responsibilities, nothing in the circumstances here suggested that the selection of AUSA Vineyard made him unable to carry out his responsibilities "with integrity, impartiality and competence," *ibid.*

b. Petitioner further argues (Pet. 11) that the district judge should have recused himself pursuant to 28 U.S.C. 455(a) because the judge had supported the selection of AUSA Vineyard for the magistrate judge position. If this was error, petitioner invited it. Counsel twice made it clear petitioner did *not* seek the district judge's recusal and affirmatively requested the judge to remain on the case. See 5/2/06 Tr. 187-188; *id.* at 196

("[W]e're not asking to remove this honorable Court. We don't want to lose this Court."). There is no reason for this Court to "set aside [the] standing rule[], so necessary to the due and orderly administration of justice" that it will not review errors a petitioner invited below. See, *e.g.*, *Johnson* v. *United States*, 318 U.S. 189, 200-201 (1943) (citation omitted).

Even if the Court were to overlook this threshold bar to petitioner's claim, he offers no objectively reasonable basis for questioning the district judge's impartiality in handling his case. See 28 U.S.C. 455(a). Recusal accordingly would have been unwarranted, as the only relevant appellate authority confirms. See *Pickard* v. *United States*, 170 Fed. Appx. 243 (3d Cir.) (affirming district judge's denial of defendant's motion to recuse following the district judge's participation in selection of defendant's former counsel to become magistrate judge), cert. denied, 549 U.S. 935 (2006).

c. Finally, petitioner asks the Court (Pet. 12) to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). That course of action is unwarranted. *Caperton* addressed whether the Due Process Clause requires an elected judge to recuse when he has "received campaign contributions in an extraordinary amount" from the corporate chairman of a party in a high-stakes case before him. *Id.* at 2256. AUSA Vineyard's continued participation as a prosecutor in petitioner's case after his selection does not present a question involving judicial bias or financial support, nor did petitioner contend below that his due process rights were violated by AUSA Vineyard's continued representation of the United States.

2. Petitioner next contends (Pet. 12-17) that the court of appeals treated the advisory Sentencing Guidelines range as "*de facto* mandatory" in violation of *United States* v. *Booker*, 543 U.S. 220 (2005), or as supplying the "presume[d] * * * sentence" in violation of *Rita* v. *United States*, 551 U.S. 338 (2007). Petitioner failed to preserve that claim below, there is no reason to think the court of appeals' affirmance rested on an incorrect understanding of *Booker* or *Rita*, and in any event the claim is unsupported by the record.

a. In *Booker*, the Court held that because the Sentencing Reform Act of 1984 made the federal Sentencing Guidelines mandatory, a Guidelines sentence that is enhanced based on facts found by the judge violates the Sixth Amendment jury trial right. 543 U.S. at 230-244. To remedy the Guidelines' constitutional defect, *Booker* invalidated provisions of the Sentencing Reform Act that made the Guidelines mandatory, 18 U.S.C. 3553(b) and 3742(e), thereby "mak[ing] the Guidelines effectively advisory." 543 U.S. at 245. This Court further held in *Rita* that a court of appeals may apply a "presumption of reasonableness" to a within-Guidelines sentence, but that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." 551 U.S. at 351.

The Eleventh Circuit recognizes that *Booker* renders the Guidelines advisory only. See, *e.g.*, *United States* v. *Shelton*, 400 F.3d 1325, 1331 (2005) ("As a result of *Booker*'s remedial holding, *Booker* error exists when the district court misapplies the Guidelines by considering them as binding as opposed to advisory."). Likewise, even before *Rita*, the Eleventh Circuit rejected the view that district courts could treat a Guidelines sentence as

presumptively reasonable. See, *e.g.*, *United States* v. *Hunt*, 459 F.3d 1180, 1184-1185 (2006).

b. Nothing in the court of appeals' decision suggests it failed to apply those rules here. Petitioner focuses (Pet. 14) on the district judge's comment that he "had considered sentencing the defendant pursuant to 18 U.S.C. § 3553 and the factors outlined therein," but "decided not to since a more appropriate sentence can be imposed pursuant to the custody guideline range as outlined [by] the U.S. Sentencing Commission." 9/11/06 Tr. 67. Petitioner contends that this reflects the district court's treatment of the Sentencing Guidelines as mandatory (Pet. i, 12-14) or presumptively reasonable (Pet. 15-16). That claim lacks merit.

Petitioner did not object to the district court's treatment of Section 3553(a). A procedural error at sentencing is subject to the general principle that any error "not brought to the [district] court's attention" is forfeited on appeal, unless it meets the standard for reversible plain error. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 732 (1993). The courts of appeals agree that where, as here, a district court asks the parties if they have any objections to the sentence and "the relevant party does not object, then plain-error review applies on appeal to those arguments not preserved in the district court." *United States* v. *Vonner*, 516 F.3d 382, 385 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 68 (2008). "[N]o court of appeals * * * has rejected this * * * approach to clarifying objections to a criminal sentence." *Id.* at 391. See, *e.g.*, *In re Sealed Case*, 527 F.3d 188, 191-192 (D.C. Cir. 2008); *United States* v. *Perkins*, 526 F.3d 1107, 1111 (8th Cir. 2008); *United States* v. *Mangual-Garcia*, 505 F.3d 1, 15 (1st Cir. 2007), cert. denied, 128 S. Ct. 2081 (2008); *United States* v. *Verk-*

hoglyad, 516 F.3d 122, 127-128 (2d Cir. 2008); *United States* v. *Lopez-Velasquez*, 526 F.3d 804, 806 (5th Cir.), cert. denied, 129 S. Ct. 625 (2008); *United States* v. *Knows His Gun*, 438 F.3d 913, 918 (9th Cir.), cert. denied, 547 U.S. 1214 (2006); *United States* v. *Lopez-Flores*, 444 F.3d 1218, 1220-1221 (10th Cir. 2006), cert. denied, 127 S. Ct. 3043 (2007); see also *United States* v. *Dragon*, 471 F.3d 501, 505 (3d Cir. 2006). Petitioner therefore must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights,'" before the court of appeals would have discretion to reverse. *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *Olano*, 507 U.S. at 732) (brackets in original). He cannot make any of these three threshold showings.[3]

First, petitioner's claim fails because the district court committed no error. A fair reading of the sentencing proceedings here does not suggest the district court thought the Guidelines were binding or entitled to a presumption of reasonableness. At sentencing, both defense counsel and the prosecution addressed the possibility of a sentence outside the calculated Guidelines range based on other Section 3553(a) factors, with the defense arguing for a sentence below the Guidelines range and the prosecutor stating that "a sentence within the guideline range would be appropriate under the 3553(a) factors." 9/11/06 Tr. 62-67. In the context of a choice between a below-guideline sentence driven by the Section 3553(a) factors, and a within-guideline sentence driven by those same factors (including the guidance provided by the advisory Sentencing Guidelines), the only fair reading of sentencing judge's statement that a

[3] The government took no position in the court of appeals on whether petitioner had preserved this issue for review, because the absence of error, see pp. 13-14, *infra*, was sufficient to dispose of petitioner's claim.

"more appropriate sentence can be imposed pursuant to the custody guideline range," *id.* at 67, is that the Section 3553(a) factors on balance warranted a sentence that fell within petitioner's Guidelines range. The claim that the district court "did *not* impose a sentence with reference to the [Section 3553(a)] factors" (Pet. 14) is belied by the very reasons the court gave in imposing the sentence it did—a belief that the Guidelines provide a "more appropriate" sentence, and a concern that a defendant be sentenced similarly to equally culpable "other defendants [sentenced] pursuant to the guideline range" (9/11/06 Tr. 67). Those are considerations enumerated in Section 3553(a). See 18 U.S.C. 3553(a)(4) and (6).[4]

Second, petitioner cannot establish that any error was "obvious," *Olano*, 507 U.S. at 734, and any ambiguity results from his failure to request clarification. Had petitioner objected when the court gave its reasons for imposing the sentence it did, the district court would have had an opportunity to state (as petitioner supposes) that it was openly disregarding *Booker*'s remedial holding, or (far more likely) that it had considered the factors in Section 3553(a) and concluded that a sentence at the low end of petitioner's Guideline range was "a sentence sufficient, but not greater than necessary, to comply with the purposes" of Section 3553(a)(2). Any ambiguity must be resolved against petitioner, because he

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[4] Petitioner notes (Pet. 13) two other points in the sentencing hearing where the district judge stated he would impose a sentence within the Guidelines range. See 9/11/06 Tr. 4, 29. The district judge's statements that he intended to impose a within-Guidelines sentence do not suggest that he believed such a sentence was mandatory or that he presumed such a sentence would be reasonable.

must carry the burden of demonstrating obvious error. See *United States* v. *Vonn*, 535 U.S. 55, 58 (2002).

Third, petitioner fails to meet his burden of showing that any error affected his substantial rights—that in the absence of error, the district court would have imposed a lower sentence. Petitioner suggests that the district court's "mandatory application of the Guidelines" caused it to "[c]ompletely ignore[]" petitioner's background, the collateral consequences of his prosecution, and his low risk of recidivism. Pet. 17. Again, the record shows otherwise. At sentencing, the district court listened to seven witnesses called on petitioner's behalf (9/11/06 Tr. 31-46); petitioner's lengthy address to the court spanned 15 pages of transcript (*id.* at 47-62); and counsels' argument on the 3553(a) factors spanned five more pages (*id.* at 62-67). The district court did not suggest the Guidelines made this an empty exercise; rather, the court listened to the testimony and argument, considered it, and pronounced sentence.

Rather than supporting petitioner's claim of prejudice, the record supports the conclusion that the district court would *not* have sentenced petitioner to a term of imprisonment of less than 97 months: The district court was evidently concerned about avoiding sentencing disparities between petitioner and his co-defendants. See 9/11/06 Tr. 67 ("[T]he Court has sentenced the other defendants pursuant to the guideline range."). The court sentenced Schrenko and Temple (defendants who pleaded guilty, no less) to 96 months and 97 months, respectively. See pp. 5-6, *supra*. There is no reason to think that the court would have applied the Section 3553(a) factors to sentence petitioner—who was equally culpable, and remained unrepentant even at sentencing,

see 9/11/06 Tr. 47-62—to a lighter prison term than Schrenko and Temple.

c. Petitioner asks (Pet. 15) that the petition be granted, the judgment of the court of appeals vacated, and the case remanded (GVR) for consideration in light of *Nelson* v. *United States*, 129 S. Ct. 890 (2009) (per curiam). *Nelson* is inapposite because there it was "plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson's Guidelines range," *id.* at 892, yet the court of appeals had affirmed his sentence, contrary to *Rita*. As discussed above, it is anything but "plain from the comments of the sentencing judge that he did apply a presumption of reasonableness"—the reasonable reading is the opposite, and any ambiguity traces to petitioner's failure to ask the district court to clarify its treatment of Section 3553(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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